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Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 February 2011)

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I. Introduction

1. The Commission considered the question of transparency in treaty-based investor-State arbitration at its forty-first session (New York, 16 June-3 July 2008). At that session, the Commission agreed that it would not be desirable to include at that time specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules ("UNCITRAL Arbitration Rules" or "Rules") themselves and that any work on treaty-based investor-State arbitration that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in treaty-based investor-State arbitration. Written observations regarding that issue were presented by one delegation (A/CN.9/662) and a statement was also made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises. The Commission was of the view that, as noted by the Working Group at its forty-eighth session (A/CN.9/646, para. 57), the issue of transparency was a desirable objective in treaty-based investor-State arbitration and should be addressed by future work. As to the form that any future work product might take, the Commission noted that various possibilities had been envisaged by the Working Group (ibid., para. 69) in the field of treaty-based investor-State arbitration, including the preparation of instruments such as model clauses, specific rules or guidelines, an annex to the UNCITRAL Arbitration Rules in their generic form, separate arbitration rules or optional clauses for adoption in specific treaties. The Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based investor-State arbitration and that broad discretion should be left to the Working Group in that respect. With a view to facilitating consideration of the issues of transparency in treaty-based investor-State arbitration by the Working Group at a future session, the Commission requested the Secretariat, resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in treaty-based investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.[1]

2. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the

[1] *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

request received from the Commission at its forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in treaty-based investor-State arbitration and that replies thereto would be made available to the Working Group.[2] Those replies are reproduced in document A/CN.9/WG.II/WP.159 and its addenda.

3. At the forty-third session of the Commission, support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues that arose more generally in treaty-based investor-State arbitration and that would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based investor-State arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.[3]

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.161, paragraphs 5-12.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-fourth session in New York, from 7 to 11 February 2011. The session was attended by representatives of the following States members of the Working Group:[4] Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Belarus (2011), Benin (2013), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), France (2013), Germany (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Kenya (2016), Malaysia (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Singapore (2013), Spain (2016), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

6. The session was attended by observers from the following States: Angola, Belgium, Cuba, Democratic Republic of the Congo, Ecuador, Finland, Indonesia,

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[2] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

[3] Ibid., para. 191.

[4] The following six State members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Iraq, Kuwait, Madagascar, Myanmar, Netherlands, Panama, Peru, Sierra Leone, Slovakia, Switzerland, Syrian Arab Republic and Zambia.

7. The session was attended by observers from the following organizations of the United Nations System: International Centre for Settlement of Investment Disputes (ICSID), Office of the High Commissioner for Human Rights (OHCHR), United Nations Conference on Trade and Development (UNCTAD) and the World Bank.

8. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), Energy Charter Secretariat, European Union (EU), Organization for Economic Cooperation and Development (OECD) and the Permanent Court of Arbitration (PCA).

9. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: American Arbitration Association (AAA), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociación Americana de Derecho Internacional Privado (ASADIP), Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York (ABCNY), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), China International Economic Trade and Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institution (IAI), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Council for Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Law Institute (ILI), Milan Club of Arbitrators, Moot Alumni Association (MAA), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), Swiss Arbitration Association (ASA) and Tehran Regional Arbitration Centre (TRAC).

10. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Shane Spelliscy (Canada)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.161); (b) a note by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.162 and its addendum); (c) notes by the Secretariat reproducing (i) comments of the Governments of Canada and of the United States of America on transparency in treaty-based investor-State arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA) (A/CN.9/WG.II/WP.163); and (ii) proposals by Governments and International Organizations (A/CN.9/WG.II/WP.164).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.162 and its addendum; A/CN.9/WG.II/WP.163; and A/CN.9/WG.II/WP.164). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations and decisions of the Working Group with respect to agenda item 5 on other business are reflected in chapter V.

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

A. General remarks

14. General remarks were made regarding the policy context in which the matter of transparency in treaty-based investor-State arbitration arose. General agreement was expressed regarding the desirability of dealing with transparency in treaty-based investor-State arbitration, which differed from purely private arbitration, where confidentiality was an essential feature. According to principles of good governance, government activities were subject to basic requirements of transparency and public access. It was pointed out that transparency in treaty-based investor-State arbitration was only one aspect of the broader notion of transparency in the treatment of investment. Beyond treaty-based investor-State arbitration, transparency was said to be essential (i) for the conduct of States' investment-related administrative procedures, (ii) for the design and implementation of domestic investment laws and regulations, (iii) for investment promotion and States' efforts to attract development enhancing investment, and (iv) for States' specific interactions with individual investors.

15. The Working Group heard a statement made on behalf of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises that adequate transparency in arbitration processes with investors where human rights, including access to clean water, affirmative action policies and the protection of indigenous peoples' rights, were concerned was essential if societies were to be aware of proceedings that might affect the public interest and therefore their own welfare. The statement further

expressed the hope that appropriate rules for transparency would not be limited solely to disputes arising under future investment treaties, but would apply also to already existing investment treaties referring to UNCITRAL Arbitration Rules, so as to avoid setting two tiers of practice. Further, it was pointed out that, in limited and well-defined circumstances, there could be legitimate exceptions to transparency, but that attention should focus on ensuring that any limitation on transparency did not defeat its very purpose with regard to good governance.

16. The view was expressed that the right of access to information was an integral component of the freedom of expression under international human rights law. It was further said that the need for access to information was recognized and the decisions in *Claude Reyes v. Chile*[5] and *Társaság v. Hungary*[6] were given as examples for such recognition. In that light, it was said that the legal standard on transparency must give full effect to the mandatory character of human rights.

17. The Working Group took note of the statements made regarding the impact of human rights on its current work and agreed that further consideration would be given to that question at a later stage of its discussion.

B. Possible forms and scope of application of a legal standard on transparency regarding future investment treaties

18. The Working Group recalled that, at its fifty-third session, it generally discussed the possible nature of a legal standard on transparency in treaty-based investor-State arbitration and the various forms it might take (A/CN.9/712, paras. 22-30 and paras. 76-100), and decided that all suggestions in that regard would require further legal analysis (A/CN.9/712, para. 94).

1. Express consent or presumption of application in the context of future investment treaties ("opt-in" or "opt-out" solutions)

19. The Working Group resumed discussion on the scope of application of a legal standard on transparency with the aim of identifying policy considerations underlying the various options that had been discussed at the fifty-third session of the Working Group. There was a general agreement that the key issue for the application of a legal standard on transparency to future investment treaties was that of consent. Therefore, the main question to be further considered related to the manner in which that consent would be expressed. In that context, consent could be expressed in two different manners. There could be a presumption in the legal standard on transparency that the standard would apply to future treaties referring to the UNCITRAL Arbitration Rules. Under that approach, the legal standard on transparency would apply, unless States otherwise provided by opting out of the legal standard on transparency ("opt-out" solution). A second option would be to require express consent of States that the legal standard on transparency would apply. Under that option, States would be required to expressly opt into the legal standard on transparency for it to come into application ("opt-in" solution).

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[5] Claude Reyes et. al. v. Chile, Inter-Am. Ct. H.R. (ser.C) No. 151 (19 September 2006).

[6] Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, Eur. Ct. H.R. (14 April 2009).

20. Regarding the option of presumption of application of the legal standard on transparency (opt-out solution), it was said that that approach would be similar to the one adopted under article 1, paragraph (2) of the 2010 UNCITRAL Arbitration Rules. It would ensure a wider application of the legal standard on transparency, and thereby ensure that the mandate given by the Commission to the Working Group to promote transparency in treaty-based investor-State arbitration would be better fulfilled. One aspect specifically discussed was the extent to which that option would require amendment of the 2010 UNCITRAL Arbitration Rules. A number of delegations that expressed support for that option were of the view that that raised two questions: from a legal perspective, it was not clear whether the amendment would be necessary; however, from a practical perspective, the amendment would achieve clarity (see below, para. 31).

21. In support of an application of the legal standard on transparency based on an express consent of States (opt-in solution), it was said that that solution would ensure that States had taken the conscious decision to apply that standard, and as a matter of policy, States should be made aware of the rules that would be applicable.

22. The Working Group agreed that discussion on opt-in or opt-out solutions were made on a preliminary basis, with the aim to identifying the policy considerations underlying both options, and that no decision in favour of one of the options was intended to be made at the current session. The question would have to be revisited once the content of the legal standard on transparency became clearer.

2. Guidelines or stand-alone rules on transparency

23. The Working Group discussed the possible forms that a legal standard on transparency might take, based on options mentioned in document A/CN.9/WG.II/WP.162, paragraphs 7 to 21, focusing in particular on whether the legal standard on transparency should take the form of guidelines or of stand-alone rules.

24. In support of a legal standard on transparency in the form of guidelines, reference was made to the arguments presented in document A/CN.9/WG.II/WP.164. It was highlighted that guidelines would adopt a different drafting style than stand-alone rules as they would be more discursive, detailed, providing explanations to parties and could lay out various options that parties could choose. Guidelines could also apply where States had consented thereto. In that respect, the option of guidelines would come very close to that of stand-alone rules on transparency that would apply if parties expressly agreed to their application (opt-in solution, see above, para. 21). Examples were given of texts that were drafted as rules or principles but were nevertheless used as guidelines applicable when the parties had agreed thereto, including the IBA Rules on the Taking of Evidence in International Arbitration and the Unidroit Principles of International Commercial Contracts (2004).

25. The view was expressed that high standards on transparency in treaty-based investor-State arbitration should be established because transparency contributed to promoting the rule of law, good governance, due process and rights to access information. It was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. It was said that the legal standard on transparency should take the form of

detailed rules of procedure rather than as discursive guidelines, as such guidelines would not provide the certainty contemplated by the objective of UNCITRAL to harmonize international trade law.

26. In a spirit of cooperation, those delegations that had thenceforth expressed a strong preference for guidelines agreed to approach the drafting exercise on the basis that the legal standard on transparency be drafted in the form of clear rules rather than looser and more discursive guidelines. That was done on the strict understanding that their prior insistence on guidelines was motivated by a desire to ensure that the legal standard on transparency would only apply where there was clear and specific reference to it (opt-in solution) (see below, para. 58).

3. Legal standard on transparency applicable as a supplement to the UNCITRAL Arbitration Rules, or more generally to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules

27. The Working Group further considered whether stand-alone rules on transparency should be made applicable to treaty-based investor-State arbitration, irrespective of the applicable arbitration rules (see document A/CN.9/WG.II/WP.162, paras. 20 and 21).

28. The Working Group was reminded of its forty-eighth session (New York, 4-8 February 2008), in which it had decided to first complete the revision of the 1976 UNCITRAL Arbitration Rules. It was said that the topic of treaty-based investor-State arbitration had been postponed to be dealt with after the completion of the revision of the 1976 UNCITRAL Arbitration Rules on the understanding that consideration of the topic was closely linked to the Rules. On that basis, it was said that the Working Group should first consider drafting rules on transparency under the UNCITRAL Arbitration Rules and then consider a possible broader application of the legal standard. It was also said that the legal standard on transparency, even if made applicable in relation to the UNCITRAL Arbitration Rules, would constitute a model for other arbitration rules, for disputing parties to adopt in particular non-UNCITRAL arbitral proceedings, or even for States to adopt in their investment treaties.

29. In response, it was pointed out that the need for transparent proceedings would apply generally to treaty-based investor-State arbitration, without being limited to ad hoc arbitration under the UNCITRAL Arbitration Rules. Not all treaty-based investor-State arbitrations took place under the UNCITRAL Arbitration Rules, and therefore, the Working Group should consider developing a legal standard on transparency of general application. It was further said that the mandate of UNCITRAL[7] was to further the harmonization of international trade law, and under that mandate, UNCITRAL should aim at establishing a unified legal framework for the fair and efficient settlement of disputes arising in international commercial arbitration.

30. To the question whether applying the legal standard on transparency to treaty-based investor-State arbitration generally would be feasible, it was explained that when a treaty contained rules on transparency, those rules would be applied by arbitral institutions despite their rules containing different provisions. It was also

[7] General Assembly resolution 2205 (XXI) of 17 December 1966.

said that the International Centre for the Settlement of Investment Disputes ("ICSID") had so far not had difficulties in applying specific rules on transparency contained in treaties in conjunction with its own rules. As an illustration, it was said that arbitration under the United States — Dominican Republic — Central America Free Trade Agreement ("CAFTA") included mandatory open hearings, and that kind of specific requirement in treaties had worked in tandem with the applicable arbitration rules.

31. A question was raised whether the 2010 UNCITRAL Arbitration Rules should be amended to refer to any legal standard on transparency that might be added to the Rules (see above, para. 20). It was said that there could be clarity in amending article 1 on scope of application of the UNCITRAL Arbitration Rules to refer to the legal standard on transparency. Other views were expressed that it might be confusing to propose three different sets of UNCITRAL Arbitration Rules (1976 Rules, 2010 Rules, and those revised to address the specific matter of transparency in treaty-based investor-State arbitration). After discussion, it was decided to defer that question to a later stage depending on decisions to be made regarding the manner in which consent of the parties would be expressed, and whether the legal standard on transparency would be drafted as a supplement to the UNCITRAL Arbitration Rules, or more generally as a legal standard of a general application covering all instances of treaty-based investor-State arbitration.

32. The Working Group agreed that the questions raised regarding the scope of application of the legal standard on transparency would be further considered at a later stage.

C. Applicability of a legal standard on transparency regarding existing investment treaties

1. General information on existing investment treaties

33. The Working Group heard information on data and trends relating to the UNCITRAL Arbitration Rules in investment treaties and their use in treaty-based investor-State arbitration. A review conducted in 2010 by the United Nations Commission on Trade and Development (UNCTAD) of 100 investment treaties showed that 60 per cent of the investment treaties referred to ad hoc arbitration under the UNCITRAL Arbitration Rules. A review conducted in January 2011 by UNCTAD of 42 available model investment treaties indicated that 76 per cent of the model investment treaties referred to the UNCITRAL Arbitration Rules. It was pointed out that some States referred to the UNCITRAL Arbitration Rules in their respective laws or investment contracts, providing the example of a State that included in new oil contracts the possibility of ad hoc arbitration under the UNCITRAL Arbitration Rules.

34. With respect to the investor's choice of arbitration rules for treaty-based investor-State arbitration, the Working Group was informed that ICSID was the forum used with the greatest frequency (in 62 per cent of the cases on average) followed by the UNCITRAL Arbitration Rules (with an average of 27.4 per cent of the cases) over the last 10 years. There was no empirical evidence that the introduction of transparency had deterred States from offering ICSID arbitration in international investment treaties or investors from accepting such offers, as the

share of ICSID cases had remained stable over the last 10 years. It was further mentioned that the absence of transparency did not seem to provide a competitive advantage for a particular set of arbitration rules, whether in the offer under investment treaties or in the conduct of arbitration.

35. Regarding the content of transparency provisions in investment treaties, the Working Group was informed that, of available investment treaties concluded in 2009, 47 per cent included general transparency provisions and 25 per cent included transparency provisions related specifically to treaty-based investor-State arbitration. Some investment treaties included "soft" transparency provisions in the wider context of investment promotion provisions, whereas others included transparency provisions that were legally binding obligations and might require important reform or proactive policies by the parties involved.

2. Automatic application of a legal standard on transparency to existing investment treaties

36. The Working Group considered the extent to which the legal standard on transparency could be made applicable to existing investment treaties, a matter that had already been considered at the fifty-third session of the Working Group (A/CN.9/712, paras. 85-100).

37. Different views were expressed on whether the legal standard on transparency could be made automatically applicable to arbitrations arising under existing investment treaties. It was pointed out that the applicability of the legal standard on transparency could depend not only on the language of the treaty, but also on the intent of the parties to the treaty. The view was expressed that a reference in treaties to the "UNCITRAL Arbitration Rules" without any further indication of a version of the Rules could be interpreted as a "dynamic reference", encompassing further possible evolutions of the Rules (A/CN.9/WG.II/WP.162, para. 30). Concern was expressed that any automatic application of the legal standard on transparency to existing treaties would have a retroactive effect, forbidden under the law of treaties. A different view was expressed that the law of treaties did not prohibit retroactivity per se, making it conditional on the intention of the parties, but that, in any case, a dynamic reference raised the question of applicability and not one of retroactivity under the law of treaties. The ICSID Rules and the World Trade Organization ("WTO") Sanitary and Phytosanitary Measures ("WTO-SPS") Agreement were given as examples of standards, to which a dynamic reference could be made in practice. It was further said that a dynamic reference for the legal standard on transparency would only be possible if the legal standard would take the form of a supplement to the UNCITRAL Arbitration Rules. It was also said that the applicability of the legal standard by a dynamic reference would also imply addressing the issue raised by the presumption in article 1, paragraph (2) of the 2010 UNCITRAL Arbitration Rules.

38. Concerns were expressed on such automatic application through a dynamic reference. It was stated that the reference to the UNCITRAL Arbitration Rules had to be interpreted in the light of public international law, as it was included in a treaty, and that therefore the Vienna Convention on the Law of Treaties ("Vienna Convention") was applicable. In that light, it was pointed out that the different options to make the legal standard applicable to existing investment treaties were laid out in document A/CN.9/WG.II/WP.162. It was said that any application of the

legal standard on transparency would not be possible without the consent of the States parties to the investment treaty and that UNCITRAL did not have the authority to impose on States application of UNCITRAL texts (A/CN.9/WG.II/WP.162, para. 29). In that regard, it was emphasized that an investment treaty was the outcome of negotiations between States based on their consent.

39. With respect to the issue of "retroactivity" or "applicability", it was said that the decisive factor was treaty interpretation and that an attempt to establish, as a general rule, the automatic application through a dynamic reference would open the door in particular cases to possible legal challenges. It was further said that such an approach would create confusion and legal uncertainty and that the Working Group should rather focus on drafting an instrument to be adopted by States aimed at ensuring that the legal standard on transparency would apply to existing investment treaties. It was also said that any automatic application would be impossible where the investment treaty expressly referred to the 1976 version of the UNCITRAL Arbitration Rules.

40. It was further said that it was not for UNCITRAL to determine whether and how the legal standard on transparency would apply to existing treaties. It was also highlighted that that application would depend on whether the legal standard on transparency would operate on the basis of an opt-in or opt-out mechanism (see above, paras. 19-22).

41. After discussion, the Working Group agreed to revisit that matter in the context of its discussion on whether the legal standard on transparency would apply on an opt-in or opt-out basis, taking into account the facts that (i) if the solution of an opt-in was favoured, that could foreclose any argument that a reference to the UNCITRAL Arbitration Rules in an existing investment treaty would bring into operation the new legal standard on transparency; and (ii) conversely, if an opt-out solution was favoured, it would leave open that argument but could in turn create uncertainty as to whether or not that standard was applicable.

3. Possible UNCITRAL instruments on the application of a legal standard on transparency to existing investment treaties

42. The Working Group then discussed whether it should consider making the legal standard on transparency applicable to existing treaties by an instrument that would either include joint interpretative declarations pursuant to article 31 (3) (a) of the Vienna Convention (A/CN.9/WG.II/WP.162, paras. 32-35), by which States would express their interpretation of the reference to arbitration in their investment treaty to include the legal standard on transparency, or a convention, whereby States could express consent or agree to apply the legal standard on transparency to arbitration under their existing and future investment treaties (A/CN.9/WG.II/WP.162, paras. 23-25). Such new convention, however, would make the legal standard on transparency applicable only to investment treaties between such States parties that were also parties to the new convention. In that context, the Working Group also considered whether the Secretariat should be mandated to explore the different options further and to prepare some drafting proposals for such options for consideration at a future session.

43. Different views were expressed on whether such instruments, including joint declarations or a convention, should be prepared to make the legal standard applicable to existing treaties. It was said that joint interpretative declarations were usually made with respect to the substantive provisions of a treaty and that any instrument, including a model declaration to refer to the interpretation of any investment treaty, would be of questionable validity and value.

44. It was also said that the development of such an instrument would be premature and outside the current mandate of the Working Group. Also, a concern was expressed that many existing investment treaties contained provisions on amendment, and amendments of those treaties must be in accordance with those provisions and not by another instrument. It was further said that it would be for States to consider how to make the legal standard applicable to existing treaties as a matter of public international law. It was further said that such work would be premature until the substance of the legal standard had been considered and that, at that stage of the deliberations, the Working Group was not in a position to provide the Secretariat with adequate directions. The Working Group was reminded of its deliberations on the 2006 Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), where the Working Group had first worked on the substance and then on the applicability of the interpretation.

45. Views were expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. It was said that the options of making the legal standard applicable to existing treaties by joint interpretative declarations pursuant to article 31 (3) (a) of the Vienna Convention, by amendment or modification pursuant to articles 39-41 of the Vienna Convention or by a subsequent agreement between States pursuant to article 30 of the Vienna Convention were interesting and practically possible options, which should be further explored. It was further said that, under public international law, States were permitted to amend or modify their existing treaties and that joint interpretative declarations were accepted in international practice. Another view expressed was that the preparation by the Secretariat of some drafting proposals for a future session would facilitate the deliberations of the Working Group.

46. After discussion, the Working Group agreed to request the Secretariat to further explore the options of making the legal standard on transparency applicable to existing treaties and to prepare some drafting proposals for such instruments for consideration at a later stage.

D. Relation between the host State and the investor, parties to the arbitration

47. The Working Group considered (i) whether the investor should be given the option in the legal standard on transparency to refuse an offer for transparent arbitration or accept it partially only, and (ii) whether both disputing parties could agree not to apply the rules on transparency once the dispute had arisen.

1. Option for the investor to refuse the legal standard on transparency

48. At its fifty-third session, the Working Group had considered the question whether the investor should be given the option to deviate from the legal standard on transparency (A/CN.9/712, paras. 30 and 95-96).

49. At the current session, it was said that the investor would express acceptance to arbitrate under terms of an offer to arbitrate, as contained in the treaty, and that that offer could not be varied. Once the offer had been accepted, the investor was bound by the terms and conditions contained in that offer.

50. It was underlined that there should not be a provision allowing the investor to vary the offer for transparent arbitration in the legal standard. It was further said that providing the investor with the last word on the application of the legal standard on transparency would unduly privilege the investor, lead to a decrease in transparency and would be contrary to the Commission's mandate to enhance transparency in treaty-based investor-State arbitration. It was pointed out that the legal standard on transparency was not meant to benefit only the investor and the host State but also civil society, so it was not for the investor alone to decide on such matters.

51. However, it was also said that it might be advisable to provide an opportunity for an investor to express its opinion to the host State's offer of transparent arbitration. In that regard, it was explained that there were two separate elements to consider: one being the body of rules on transparency, and the other being the mechanism triggering their application. Depending on whether the legal standard on transparency would contain an opt-in or opt-out mechanism, it would be up to the State to formulate the offer it wished to make to the investor.

52. In response to a concern, it was clarified that the need to protect sensitive and confidential information would be covered by limitations to be further defined under the rules on transparency (see below, paras. 129 to 147) (referred to as "limitations to transparency set out in section 6").

53. After discussion, there was broad consensus in the Working Group that the legal standard on transparency should not include a right for the investor to derogate from the offer for transparent arbitration.

2. Agreement to depart from the legal standard on transparency after the dispute had arisen

54. The Working Group agreed to further consider the issue outlined in paragraph 53 of document A/CN.9/WG.II/WP.162, whether the disputing parties could deviate from the legal standard on transparency (see also A/CN.9/712, paras. 97-98).

55. The Working Group noted that treaty-based investor-State arbitration, contrary to commercial arbitration where the will of the arbitrating parties was decisive, was conducted on the basis of an underlying treaty between States Parties, which limited the ability of the disputing parties to depart from the prescribed route of the underlying treaty. It was also said that the expectations of third parties who stood to benefit from the legal standard on transparency had to be taken into due consideration.

E. Possible content of a legal standard on transparency

56. At its fifty-third session, the Working Group generally agreed that the substantive issues to be considered in respect of the possible content of the legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submissions by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information ("registry") (A/CN.9/712, para. 31).

57. At its current session, the Working Group agreed to resume its discussion on each of the identified matters. The Working Group took note of the suggestion that the current list of items regarding the content of the legal standard on transparency did not appear to address a question related to the procedure for appointment of arbitrators in treaty-based investor-State arbitration. In that light, it was suggested that the Working Group should consider whether specific transparency rules for appointment of arbitrators should be defined, in particular when appointment was made by appointing authorities. That suggestion did not receive support (see below, para. 153).

58. The Working Group agreed to proceed with a discussion on developing the content of highest standards on transparency, on the basis that the legal standard on transparency be drafted in the form of clear rules, taking account of the understanding contained in paragraph 26 above. It was said that the content of the legal standard on transparency might need to be reconsidered, and its content possibly diluted in case the Working Group would at a later stage decide that the application of the legal standard would be based on a presumption (opt-out solution, see above para. 20).

1. Publicity regarding the initiation of arbitral proceedings

Timing of the publication and documents to be published

59. At the fifty-third session of the Working Group, different views were expressed on whether the existence of arbitral proceedings should be made public once the arbitral proceedings commenced, or when the arbitral tribunal was constituted (A/CN.9/712, para. 34). Different views were expressed regarding the information to be made public prior to the constitution of the arbitral tribunal, in particular, whether it should be limited to the existence of a dispute, or also include publication of the notice of arbitration (A/CN.9/712, para. 33). It was suggested that providing only preliminary information regarding the parties involved, their nationality, and the economic sector concerned might be sufficient (A/CN.9/712, para. 33).

60. At its current session, the Working Group focused its attention on whether and when the notice of arbitration should be made public. It was pointed out that the decision on that matter would be guided by policy consideration on whether civil society should play an active role at that stage of the proceedings.

61. The Working Group generally agreed that the notice of arbitration should be disclosed. It was said that as most of the important documents of the proceedings

would be disclosed, the notice of arbitration and the response thereto should also be published.

62. However, diverging views were expressed on the question whether the notice of arbitration should be published before the constitution of the arbitral tribunal, taking account in particular of the fact that the UNCITRAL Arbitration Rules were ad hoc rules, without any institution to handle issues that might arise before the constitution of the arbitral tribunal.

63. Views were expressed that the notice of arbitration, and more generally publicity on the existence of the arbitral proceedings, should be made public after the arbitral tribunal was constituted. In support of that view, it was said that the arbitral tribunal would be best placed to police matters of confidential and sensitive information that might be contained in the notice of arbitration. Publication of the notice of arbitration at a later stage, it was said, would also protect the parties to the arbitration from possible pressures of civil society, in particular on matters such as the appointment of arbitrators, which was said to be a right of the disputing parties. It was pointed out that the respondent State needed time to organize its defence and to prepare its response to the notice of arbitration. With a view to ensuring fairness, details of the dispute contained in the notice should be made public only when the respondent State had an opportunity to present its own position in the response to the notice. It was said that during the time following the notice of arbitration and until the response to the notice was filed, there were possibilities for settling the dispute which would be compromised once the parties' positions as expressed in the notice of arbitration and the response would be published. In response, it was said that treaties usually provided for a period prior to the commencement of arbitration proceedings where parties could try to resolve disputes amicably.

64. Opposing views were that publication after constitution of the arbitral tribunal would not permit civil society to be informed of the commencement of the proceedings, to express their views at an early stage of the proceedings, and to possibly express views on the composition of the arbitral tribunal. It was said that prompt publication of the notice of arbitration best served the interest of transparency. Under that approach, there should be full disclosure of the notice of arbitration, once served, with possible solutions to address the need to protect sensitive and confidential information. An illustration of practical ways to deal with that matter were given: when a State was put on notice that an investor was commencing an arbitration, the State would, before publishing the notice of arbitration, request the investor to consider whether it wished to redact certain information, and the defendant State would also decide whether some information would need to be redacted. In case of disagreement between the parties on the information to be redacted, the most redacted version of the notice of arbitration would be published. A similar procedure could be adopted in the legal standard on transparency, as in the experience of States having adopted such an approach, no difficulties had arisen. It was pointed out that pressures from the public were inherent in publication and transparency. It was suggested that a procedure could be devised in the rules on transparency, whereby the notice of arbitration could be published, subject to the parties' agreement to redact sensitive and confidential information. In case of disagreement between the parties on the information to be redacted, the most redacted version of the notice of arbitration would be published. After its constitution, the arbitral tribunal could decide on the disputed information

to be made public and, if necessary, order publication of a revised notice of arbitration.

65. It was pointed out that, as the legal standard to be drafted was meant to establish clear rules of universal application, a simple procedure would be preferable. The determination of what would constitute the most redacted version of a notice of arbitration in the example given in paragraph 64 above might not be easy to determine in all instances. Under that view, it would be preferable to publish the notice of arbitration after constitution of the arbitral tribunal, so that the arbitral tribunal could assist in determining confidential and sensitive information that should not be published. However, the need to provide information to civil society as soon as the proceedings commenced was also acknowledged.

66. As a compromise solution, it was suggested that the notice of arbitration should be published once the arbitral tribunal was constituted and there should also be disclosure of information on the existence of the proceedings, along the lines of the ICSID procedures, promptly upon the receipt of the notice of arbitration. For instance, Regulation 22(1) of the ICSID Administrative and Financial Regulations provides that "[t]he Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding".

67. The attention of the Working Group was drawn to a proposal contained in paragraph 45 of document A/CN.9/WG.II/WP.162/Add.1, which provided that: "Information regarding the name of the parties, their nationalities and the economic sector involved shall be made publicly available once [the notice of arbitration has been received by the respondent] [the arbitral tribunal has been constituted]."

68. Some support was expressed for the proposal mentioned in paragraph 67 above, with the understanding that the text appearing in the first bracket would be retained and the text in the second bracket deleted. It was said that that proposal was in line with the current procedure at ICSID, and constituted therefore a procedure with which many States were already familiar. As a matter of drafting, it was suggested to refer to "a brief description of the subject matter of the claim" instead of the "economic sector involved" in order to convey more precise information to the public.

69. With a view to providing a procedure for the parties to publish the notice of arbitration before the constitution of the arbitral tribunal, a further proposal was made, along the following lines: "Once the notice of arbitration has been received by the respondent, the respondent shall promptly make publicly available (i) information regarding the name of the parties, their nationalities and the economic sector involved; and (ii) the notice of arbitration, except with respect to any portion of the notice to which either the claimant (at the time it submits the notice) or the respondent objects on the ground that it contains protected information."

70. That proposal also received some support. It was said to provide a simple and clear procedure regarding the information to be published at an early stage of the procedure, and the conditions for publication of the notice of arbitration, thereby addressing concerns expressed in the Working Group (see above, para. 65). It was explained that it was for the claimant to identify, when sending the notice of

arbitration, the information to be redacted, and the respondent would have an opportunity to proceed in the same manner. It was further explained that the draft had been prepared based on the hypothesis that the respondent was responsible for making the information public, but that could be modified if the Working Group subsequently decided to establish a repository of published information. It was further explained that that proposal clarified that the only information that could be withheld was the information falling in the category of limitations to transparency set out in section 6.

71. It was suggested that the proposal contained in paragraph 69 above be amended to allow either the claimant or the respondent to object to the publication of the notice of arbitration without conditioning the objection on limitations to transparency set out in section 6. It was suggested that, at the early stage of the proceedings, there might be various reasons why a party would not wish to have information contained in the notice of arbitration made public. It was also suggested to reverse the presumption regarding the publication of the information and provide that the notice of arbitration should not be published, unless both parties agreed to its publication. A number of concerns were reiterated on the publication of the notice of arbitration before the constitution of the arbitral tribunal.

72. With a view to striking a better balance between the need for a transparent procedure and the protection of sensitive and confidential information, a suggestion was made that "any publication of information relating to the notice of arbitration should comply with the duty of confidentiality under applicable law". That proposal did not receive support, in particular as it was seen as potentially allowing either party to publish information without the consent of the other party, and did not provide for a harmonized procedure.

73. A question was raised whether the discussion on the time for publication would need to include also consideration of the party or the institution responsible for the publication and possible sanctions if any obligation to publish was not complied with. In response, it was clarified that the Working Group would address those matters when considering whether a central repository should be established.

74. After discussion, the Working Group agreed that there was support for the proposal contained in paragraphs 67 and 68 above. The Working Group took note of concerns expressed regarding that proposal by those in favour of publishing information after the constitution of the tribunal. The Working Group requested the Secretariat to prepare a draft based on that proposal, and to also prepare alternative drafts reflecting the proposals contained in paragraphs 69 and 71 above for consideration by the Working Group at a future session.

2. Documents to be published

75. The Working Group recalled that, at its fifty-third session, different views were expressed on whether, and if so which, documents should be published (A/CN.9/712, paras. 40 to 42). The view was expressed that all documents submitted to, and issued by, the arbitral tribunal should be made available to the public. A contrary view was that not all documents would need to be published, in particular in view of the necessity to find the right balance between the requirements of public interest and the legitimate need to ensure manageability and efficiency of the arbitral procedure.

76. At its current session, the Working Group considered proposals contained in document A/CN.9/WG.II/WP.162/Add.1, paragraphs 46 and 47 aimed at reflecting the different views expressed by the Working Group at its fifty-third session.

77. It was clarified that "section 6" mentioned in the proposals under consideration referred to the possible limitations to transparency to be further defined in the legal standard on transparency. It was also clarified that the bracketed text referring to the right of parties to agree otherwise would be further considered in the light of the decision to be made on whether the disputing parties were free to agree to depart from the legal standard on transparency after the dispute had arisen (see above, paras. 54 and 55), and would therefore not be extensively discussed in the context of each proposal. It was further clarified that the publication of the arbitral award would be dealt with separately (see below, paras. 93 to 100).

78. An observation was made that none of the options was indicating the time when the documents should be published. It was explained that the understanding was that publication would be made once the documents were available. In that regard, a view was expressed that publication of documents during the arbitration could put in danger the integrity of the proceedings. According to that view, the aim of transparency could also be achieved through publication of the main documents after the proceedings. In that regard, a comment was made that, in some jurisdictions, the law prohibited an arbitral tribunal from disclosing information until the proceedings were terminated.

79. In response to a general question whether there should be an analysis of the applicable law under which the arbitral tribunal would exercise any power conferred to it under the provision on publication of documents, it was said that the approach would be very similar to that adopted under article 15 of the 1976 UNCITRAL Arbitration Rules, or article 17 of the 2010 UNCITRAL Arbitration Rules, and that the question of applicable law was not intended to be dealt with under the rules on transparency. A view was expressed that investment treaties usually contained provisions on applicable law that would be relevant to that determination.

Option 1, variant 1

80. The first proposal, referred to as option 1, variant 1 in paragraph 46 of document A/CN.9/WG.II/WP.162/Add.1, provided that "[A]ll documents submitted to, or issued by, the arbitral tribunal shall be made publicly available [unless all parties agree otherwise,] subject to section 6 below."

81. Various views were expressed on option 1, variant 1. It was said that providing access to all documents, subject to the limitations to transparency set out in section 6 was an optimal solution, ensuring that the public would have sufficient access to documents. The Working Group recalled that, at its fifty-third session, it considered that, in the general framework of allowing amicus curiae submissions, the importance of access to documents was emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51).

82. While the proposal under option 1, variant 1 was considered as an option favouring full transparency, the attention of the Working Group was drawn to the cost and burden that such an approach might entail. It was said that, in many cases, evidentiary records were extensive, and it would be a cumbersome exercise for

parties and the arbitral tribunal to redact sensitive and confidential information therefrom. In response to that concern, it was explained that, if for practical reasons not all documents could be published, the documents not published could be made available to third parties upon their request.

Option 1, variant 2

83. The second proposal, referred to as option 1, variant 2 in paragraph 46 of document A/CN.9/WG.II/WP.162/Add.1, provided a defined list of documents that should be published, and read as follows: "The following documents shall be made publicly available: the notice of arbitration; pleadings, submissions to the tribunal by a disputing party and any written submissions by the non-disputing party and amicus curiae; minutes or transcripts of hearings of the tribunal, where available; and orders, awards, and decisions of the tribunal [unless the disputing parties otherwise agree,] subject to section 6 below."

84. That option received support on the basis that it provided a good balance between the principles of transparency and necessary exceptions thereto. It was noted that, in the list of documents, there was no reference to documentary evidence, witness statements, expert witness reports, and further consideration should be given to the list contained under option 1, variant 2. It was also questioned whether written submissions by non-disputing State(s) Party(ies) and amicus curiae should be in the list of documents to be disclosed, as such documents might be to the detriment of one party. It was further said that the most interesting information for the public might not necessarily be contained in any of the documents listed, as such information might be contained in an attachment or annex to a document. A limited list of documents might deprive third parties of essential pieces of information for understanding the case. It was suggested to provide under that option for a more flexible approach and to permit the tribunal to make an order for publication of further specific documents following an application by a third party.

Option 2

85. The third proposal, referred to as option 2 in paragraph 47 of document A/CN.9/WG.II/WP.162/Add.1, provided that "The arbitral tribunal shall decide, in consultation with the parties, which documents to make publicly available."

86. In support of that proposal, it was said that the arbitral tribunal would be best placed to determine the documents that should be published, as well as issues of public interest that should be brought to the attention of civil society. It was suggested that instead of consulting the parties, the arbitral tribunal should obtain their approval for the publication or, as a variant, that if a party objected, the arbitral tribunal should then refrain from publishing the documents. It was said that that provision would allow publication to be dealt with on a case-by-case basis, and would come close to the procedure followed by ICSID regarding publication of documents in the course of proceedings. Doubts were expressed on whether that option would be sufficient to enhance transparency in treaty-based investor-State arbitration. It was said that the current proposal was very close to current practice in commercial arbitration, and might therefore not sufficiently promote transparency. It was pointed out that that option placed complete discretion on the arbitral tribunal but gave no indication as to how to exercise that discretion. It was considered

desirable to provide some guidance to the arbitral tribunal in that regard, either in the specific rule on access to documents or in a general rule. A view was expressed that consultation of the parties by the arbitral tribunal should also be provided for.

87. After discussion, the Working Group took note of four new approaches that emerged from its consideration of the matter that could be summarized as follows.

88. Under a first approach, the arbitral tribunal should decide which documents to make publicly available, unless a party was opposed to the publication. It was pointed out that under that first approach, the arbitral tribunal would have in fact less discretionary power than it currently enjoyed under the UNCITRAL Arbitration Rules, which provided under articles 15 of the 1976 Rules and 17 of the 2010 Rules that "the arbitral tribunal may conduct the arbitration in such manner as it considered appropriate […]". It was further said that, under the UNCITRAL Arbitration Rules, the arbitral tribunal might order publication of documents if it considered it appropriate without any party having a right to oppose. It was therefore questioned whether that first approach was consistent with the mandate of the Working Group to provide for rules on transparency.

89. Under a second approach, all documents should be made publicly available; however, if as a matter of practicability, they were not all published, third parties would still have the right to access the information, upon request, applying the limitations to transparency set out in section 6.

90. Under a third approach, a defined list of documents would be made available in any case while the arbitral tribunal would have the ability to order publication of any other documents it deemed relevant. Under that option, third parties would also have a right to request access to additional information but, contrary to the second approach, would not have an entitlement to such access. The limitations to transparency set out in section 6 would also apply under that proposal.

91. A fourth approach would consist in providing a list of documents that could be made publicly available. The arbitral tribunal in its discretion would decide which documents to publish on a case-by-case basis, subject to the limitations to transparency set out in section 6.

92. The Working Group requested the Secretariat to prepare alternative draft proposals to reflect the discussion of the Working Group for consideration at a future session.

3. Publication of arbitral awards

93. The Working Group recalled the deliberations at its fifty-third session, where many delegations had expressed support for the establishment of a general provision whereby awards rendered by arbitral tribunals in treaty-based investor-State arbitration should be published (A/CN.9/712, para. 62), and proceeded to consider the issue of publication of arbitral awards at its current session.

94. The Working Group was informed that the Investment Committee of the Organization for Economic Cooperation and Development (OECD) had issued a statement in June 2005, which expressed the general understanding among the members of the Investment Committee that additional transparency, in particular in relation to the publication of arbitral awards, subject to the necessary safeguards for the protection of confidential business and governmental information, was desirable

to enhance effectiveness and public acceptance of investment arbitration and to contribute to the further development of jurisprudence.

95. In that light, some support was expressed for having a simple rule on the publication of arbitral awards in treaty-based investor-State arbitration, which would provide for arbitral awards to be published. Such publication, it was said, would enhance transparency in treaty-based investor-State arbitration and would best serve the mandate given by the Commission to the Working Group.

96. It was explained that the publication of the arbitral award would also be subject to the limitations to transparency set out in section 6. The Working Group noted that any rule it would craft on the publication of arbitral awards would have to be considered in light of article 32 (5) of the 1976 UNCITRAL Arbitration Rules and article 34 (5) of the 2010 Rules that made the publication of arbitral awards subject to the consent of all parties, in particular if the legal standard was to constitute a supplement or annex to the UNCITRAL Arbitration Rules.

97. Some support was also expressed for a rule on publication of arbitral awards based on the proposal in document A/CN.9/WG.II/WP.162/Add.1, paragraph 17, which read as follows: "Awards shall be published unless all parties agree otherwise. In case the parties do not agree to the publication of an award, the arbitral tribunal shall promptly make publicly available excerpts of the legal reasoning of the tribunal." With respect to that proposal, it was clarified that the reference to "parties" included only the disputing parties and neither interested third parties nor the other State(s) Party(ies) to the underlying investment treaty. It was further clarified that the reference to "In case the parties do not agree to the publication of an award" was to be understood as requiring all parties to agree not to publish.

98. Doubts were expressed on whether that proposal would contribute to enhancing transparency as it was very close to the corresponding provision of the UNCITRAL Arbitration Rules.

99. It was noted that the draft proposals contained in paragraphs 17 and 46 of document A/CN.9/WG.II/WP.162/Add.1 used varying terminology to refer to decisions made by the arbitral tribunal, such as "orders", "awards" and "decisions of the tribunal". The Working Group agreed that there should be consistency in terminology and a common rule on publication of all decisions made by the arbitral tribunal should be established.

100. After discussion, broad support was expressed in the Working Group for a simple provision whereby awards would be made publicly available, with those delegations which had expressed reservations in that respect requesting that the Working Group ensured adequate protection of confidential or sensitive information in order to address their concerns. The Working Group requested the Secretariat to prepare draft proposals on publication of awards taking account of the discussions of the Working Group for consideration at a future session.

4. Hearings and transcripts thereof

Public hearings

101. At its fifty-third session, the Working Group had considered whether hearings should be open to the public (A/CN.9/712, para. 52). Both support and reservations

had been expressed regarding public hearings. It had been suggested that a provision on open hearings in any legal standard to be prepared on transparency should provide that hearings should be open to the public, unless the parties agreed otherwise (A/CN.9/712, paras. 53-55). In contrast, reservations of a general nature had been expressed regarding public hearings, a concept that had been viewed to be contrary to the very nature of arbitration, which had been said to be confidential and not to allow for third parties' access to hearings (A/CN.9/712, para. 57).

102. At its current session, the Working Group considered a draft proposal contained in document A/CN.9/WG.II/WP.162/Add.1, para. 50, which read as follows: "In the event of oral hearings, the tribunal shall conduct hearings open to the public [unless either party objects] and shall determine, in consultation with the parties, the appropriate logistical arrangements." Support was expressed for the suggestion to include in that text a reference to the limitations to transparency set out in section 6.

103. It was said that open hearings were a fundamental feature of transparent arbitral proceedings. The proposal reflected in paragraph 102 above was considered as providing a simple and adequate rule on open hearings. However, it was said that that proposal only covered logistical arrangements but did not address the power of the tribunal to limit public access.

104. Diverging views were expressed on whether to delete the bracketed text in paragraph 102 above, which permitted either party to object to open hearings. Those favouring deletion of the bracketed text pointed out that rules on transparency were crafted mainly to benefit civil society, and the parties should not be involved in that determination. Further, it was questioned whether designing a rule on open hearings that parties could defeat at their own discretion would be in accordance with the mandate of the Working Group to promote transparency.

105. A contrary view was expressed that the right of either party to object to open hearings should be asserted. It was suggested that Rule 32 (2) of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), with necessary adjustments, be considered by the Working Group as a possible option to deal with that issue, as it included a right for either party to object to open hearings. Rule 32 (2) of the ICSID Arbitration Rules read as follows: "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information."

106. With the view to conciliating the diverging opinions on whether parties should have a right to object to open hearings, a proposal was made that the arbitral tribunal should decide whether to hold open hearings, "in consultation with the parties". A view was expressed that not all hearings were necessarily of public interest, and that the arbitral tribunal would be best placed to determine which hearings or which parts of the hearings to make public. That option would also preserve the possibility for the parties to express their views, but where the public interest would be at stake, the arbitral tribunal would have the power to overrule any objection by the parties, and hold open hearings.

107. The proposal reflected in paragraph 106 received some support. It was suggested that it could be complemented by a sentence clarifying that, as a matter of principle, hearings should be held in public.

108. It was questioned whether more guidance should be provided on how the tribunal would decide to hold open or closed hearings. Some expressed the view that it was neither desirable nor possible to provide guidance to the arbitral tribunal. However, several suggestions were made on possible ways to provide such guidance.

109. It was suggested that the limitations to transparency set out in section 6 should guide the arbitral tribunal. It was questioned whether the exceptions to transparency that related mainly to the protection of confidential and sensitive information would cover all the instances where hearings would need to be held in private. It was suggested that the arbitral tribunal might need the discretion to decide that hearings would be held in private for practical reasons. The view was also expressed that not all hearings necessarily involved matters of public interest.

110. In response to a suggestion that the existence of public interest issues should guide the arbitral tribunal in its decision, it was said that treaty-based investor-State arbitration involved, by nature, public interest because such arbitration implicated a State's exercise of discretionary powers. Others said that the public interest in a case might not always be immediately apparent to the arbitral tribunal, which should not be burdened with the task of identifying whether or not matters were of public interest. It was questioned whether the purpose of the rule on open hearings was to allow access of the public or to limit it to hearings where matters of public interest were at stake.

111. In response to a suggestion that the arbitral tribunal could obtain guidance by consulting the parties, it was stated that the parties, having their own personal interests in the matter, might not be best placed to advise the arbitral tribunal on that matter.

112. A suggestion was made to clarify in a preamble to the rules on transparency the purpose they were intended to serve along the lines of: "[W]ith the purpose of enhancing the legitimacy of treaty-based investor-State arbitration and of fostering the public interest inherent in treaty-based investor-State arbitration, these rules on transparency have been developed to apply in treaty-based investor-State arbitrations. These purposes shall guide arbitral tribunals in the application of these Rules."

113. In response to a question whether the disputing parties could decide that hearings should be held in private despite the legal standard providing for open hearings, it was said that that matter should be considered at a later stage of the deliberations.

114. After discussion, the Working Group took note of the various views expressed, and requested the Secretariat to prepare draft proposals for consideration at a future session. The views expressed in the Working Group were summarized as follows. A first group of views was that either disputing party should have a right of veto as to whether to hold public hearings. Questions were raised as to whether that was compatible with the mandate of the Working Group. A second group was of the view that discretion should be left to the arbitral tribunal in that respect. That raised the

question whether relevant guidance should be given to the arbitral tribunal, and if so, which. A third group was of the view that there should be a simple rule that hearings were to be public, subject only to exceptions on the grounds of logistical arrangements and limitations to transparency set out under section 6. It was stated that there might not be much difference between the second and third groups as both accepted that, in principle, the arbitral tribunal had some discretion in the matter. The question was the extent of the discretion: unfettered, with some guidance or restrained with some limitations. That matter could be usefully explored further once the limitations to transparency set out in section 6 became clearer.

Transcripts of hearings

115. It was noted that the decision to be made regarding transcripts of hearings should depend upon the solution adopted in respect of public access to hearings (see also A/CN.9/712, para. 58). Some delegations questioned that interpretation. It was agreed to further consider that matter in conjunction with the various drafting proposals that would be prepared by the Secretariat for consideration at a future session.

5. Submissions by third parties (amicus curiae) in arbitral proceedings

116. The Working Group recalled its consideration of the matter of submissions by third parties, also known as amicus curiae submissions, at its fifty-third session where many delegations had expressed strong support for allowing amicus curiae submissions on the ground that they could be useful for the arbitral tribunal in resolving the dispute and promoted the legitimacy of the arbitral process (A/CN.9/712, para. 46).

Restricting criteria for amicus curiae submissions

117. At the fifty-third session of the Working Group, it had been widely felt that certain restricting criteria should be put in place for amicus curiae submissions, including the subject matter of the submission, expertise of the amicus curiae, relevance for the proceedings, appropriate page limits, and the time when such submissions would be allowed (A/CN.9/712, para. 47). At the current session, the Working Group continued its deliberation on which criteria should apply to amicus curiae submissions.

118. One proposal made to determine criteria for amicus curiae submissions was based on a provision used in certain investment agreements, which was said to reflect an evolution in practice, and which read as follows: “[T]he tribunal shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party.”

119. Although the proposal reflected in paragraph 118 above was found to be a clear and straightforward rule, it was suggested that a provision on that matter might need to be more detailed, in order to provide guidance to parties and the arbitral tribunal, taking account of the fact that a number of States had little experience in the field. In that light, it was proposed to consider whether a provision on amicus curiae submissions as that included in the interpretative document produced by the NAFTA Free Trade Commission’s “Statement of the Free Trade Commission on

non-disputing party participation of 7 October 2004" ("FTC Statement") could be a useful model.

120. In support of the latter proposal, it was said that any provision the Working Group would draft should provide sufficient guidance to the arbitral tribunal on how to deal with amicus curiae submissions. Further, such provision should foresee the possibility that the parties should be consulted by the tribunal, so that the issue of acceptance of amicus curiae submission should not be left to the arbitral tribunal alone. Any provision on that matter should clarify that there would not be an automatic entitlement for amici to have their submissions accepted.

121. As an intermediate solution between the proposal contained in paragraph 118 above, and the provision in the FTC Statement which was very detailed, it was suggested to consider drafting a provision along the lines of Rule 37 (2) of the ICSID Arbitration Rules. In support of that approach, it was said that it would provide appropriate guidance without being as long as the provision on submission of amicus curiae briefs in the FTC Statement.

122. It was noted that Rule 37 (2) of the ICSID Arbitration Rules did not include the requirement of revealing the identity of the non-disputing party, the nature of its membership if it was an organization, and the nature of its relationships, if any, to the parties in the dispute, including whether the non-disputing party had received financial or other material support from any of the parties or from any person connected with the parties in that case. Those points were dealt with in detail in paragraph B.2 of the FTC Statement referred to in paragraph 119 above. As those points were found important, it was suggested that they should be included in a provision on that matter.

123. After discussion, the Working Group requested the Secretariat to prepare draft provisions based on proposals mentioned in paragraphs 118 and 122 above, for consideration by the Working Group at a future session.

Intervention by non-disputing State(s)

124. The Working Group recalled that, at its fifty-third session, it had been observed that another State Party to the investment treaty at issue that was not a party to the dispute could also wish, be invited, or have a treaty right to make submissions. It had been noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation (A/CN.9/712, para. 49). The Working Group further recalled and reiterated its decision to bring that matter to the attention of the Commission and ask its guidance on whether that matter should be made part of the scope of the current work (A/CN.9/712, para. 103).

Decisions on amicus curiae submissions

125. In the light of its deliberation on restrictions of submissions by amicus curiae, the Working Group agreed that, if detailed procedures were to be provided, the arbitral tribunal should be required to consult the parties before rendering its decisions on amicus curiae submissions.

Levels of access to documents

126. The Working Group recalled its deliberation at the fifty-third session where, in the general framework of allowing amicus curiae submissions, the importance of access to documents had been emphasized, as the quality of any amicus curiae submissions would depend on the permitted level of access to documents (A/CN.9/712, para. 51). At the current session, the Working Group considered, with respect to the role of amicus curiae, whether there should be a rule providing for different levels of access to documents for the general public on one hand and amicus curiae on the other hand.

127. It was noted that three categories of potential third parties had to be considered with respect to access to documents. The first category was the general public. The second category included third parties that had an interest in the subject matter of the dispute that might need access to wider information in order to make submissions that could benefit the arbitral tribunal in its decision making if those parties were granted leave to make submissions as amici. A third category included parties that had a personal interest in the outcome of the proceedings (for instance, a person that would receive benefits of an alleged expropriation) and might therefore be said to have an interest in participating in the proceedings. It was said that a different level of access of information might need to be provided in respect of each category identified. A different view was that it might be difficult in practice to differentiate the category of amici from that of the general public before a submission was accepted, and that there should not be different levels of access provided in a provision on that matter.

128. After discussion, the Working Group agreed that participation in the arbitral process of the third category of persons mentioned in paragraph 127 above raised matters of joinder, which might require specific rules in the context of treaty-based investor-State arbitration. However, the Working Group agreed that that matter was not part of the current mandate of the Working Group to deal only with transparency (see below, para. 153). Further, it was noted that the decision on the level of access to be granted to amici was closely linked to the provision on publication of documents. Against that background, the Working Group agreed to further consider that matter at a later stage of its deliberations, based on draft proposals to be submitted in relation to the provision on documents to be published (see above, paras. 75 to 92).

6. Possible limitations to transparency rules

129. The Working Group recalled that, at its fifty-third session, it had agreed that there should be possible limitations to transparency. Various categories of possible exceptions or limitations were mentioned: (i) protection of confidential and sensitive information, (ii) protection of the integrity of the arbitral process, and (iii) ensuring manageability of the arbitral proceedings (A/CN.9/712, paras. 67 to 72).

Protection of confidential and sensitive information

130. At the fifty-third session of the Working Group, it had been generally recognized that the question of protection of confidential and sensitive information was important to take into account as part of the discussion on transparency.

131. Against that background, a proposal was made to request the Secretariat to prepare a draft that would take into account both transparency and confidentiality as legitimate interests and to find a right balance to protect both interests. The Working Group agreed that, though the concept of confidential or sensitive business information was quite clear, the Secretariat should be given more guidance for drafting a proposal on the protection of confidential information pertaining to States. It was further said that there often was national legislation to protect certain information and the question of applicable law would have to be taken into account by the Secretariat when drafting proposals on the protection of confidential and sensitive information for future deliberations of the Working Group. In response, it was said that the legal standard on transparency would, when finalized, probably also include a rule similar to that of article 1 (2) of the 1976 UNCITRAL Arbitration Rules or article 1 (3) of the 2010 Rules, which provided that the legal standard was not intended to derogate from any mandatory applicable law.

132. It was said that the model bilateral investment treaty of one delegation and the "Notes of Interpretation of Certain Chapter 11 Provisions" published by the NAFTA Free Trade Commission (FTC) on 31 July 2001 referred to the redaction of "information which is privileged or otherwise protected" from disclosure under the party's domestic law to the public. The Working Group agreed that the notion of "privileged information", which might not be understood in the same manner in all jurisdictions, might need further consideration in order to determine whether a provision on the protection of confidential and sensitive information should also refer to privileged information.

133. After discussion, the Working Group agreed to request the Secretariat to prepare draft proposals on a provision for the protection of confidential and sensitive information for consideration at a future session of the Working Group.

134. The Working Group recalled that the determination of confidential and sensitive information could be handled by the arbitral tribunal or the parties (A/CN.9/712, para. 69). It was noted that paragraph 40 of document A/CN.9/WG.II/WP.162/Add.1 included a proposal that the parties should agree on the determination of confidential and sensitive information and that only in case an agreement could not be found, the arbitral tribunal would make that decision. A further proposal was made that the parties would be given a margin of discretion for the determination of the confidential and sensitive nature of information. The role of the arbitral tribunal would then be limited to controlling whether the parties exercised their obligations in good faith.

135. The Working Group agreed to consider that matter at a future session, in light of draft proposals to be prepared by the Secretariat.

Protection of the integrity of the arbitral process

136. The Working Group recalled that, at its fifty-third session, it had been generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

137. It was felt by the Working Group that the "integrity of the arbitral process" would need to be defined, as it could otherwise become an overly broad category, and exceptions to transparency should be concisely defined.

138. It was said that the integrity of the arbitral process included the protection of the parties to the proceedings, their counsel, the witnesses and the arbitral tribunal from intimidation and physical threats. It was pointed out that there might be other examples falling in that category, such as disruption to hearings by members of the audience. Other examples were given of matters external to the arbitral proceedings, including general politicization of the proceedings and manipulation by the mass media.

139. Concerns were expressed regarding the nature and scope of that category of possible exceptions to transparency because it seemed overly broad and vague and might inappropriately limit transparency. It was further said that any exception to transparency for the protection of the integrity of the arbitral process should be based on a high threshold, and should be limited to the examples given of protection from intimidation or physical threat to persons involved in the arbitral proceedings. Language referring to the "risk of aggravation of the dispute" or "rendering the resolution of the dispute difficult or impossible" would be too broad.

140. It was said that issues of due process or disturbance of the hearings should not be understood as falling under the category of the protection of the integrity of the arbitral process, and some of the concerns could be addressed by appropriate language in the provision on the conduct of hearings.

141. It was suggested that one of the threshold measure against the objective of ensuring that hearings were open should be the fairness and efficiency of the proceedings.

142. It was also suggested that the arbitral tribunal already enjoyed wide discretionary power under the UNCITRAL Arbitration Rules (articles 15 of the 1976 Rules and 17 of the 2010 Rules) to conduct the proceedings as appropriate and that protection of the integrity of the arbitral process might already be covered by that discretionary power. It was suggested that the Secretariat could make further research on cases in international arbitration under the UNCITRAL Arbitration Rules to analyze how that discretionary power had been used by tribunals to protect the integrity of the arbitral process.

143. After discussion, the Working Group agreed that the questions for further consideration on that matter would include: (i) whether a provision on protection of the integrity of the arbitral process should be in the form of a general formulation or should contain specific instances that were meant to be specifically addressed, (ii) the interplay between the protection of the integrity of the arbitral process and the provisions in the UNCITRAL Arbitration Rules already dealing with that issue; and (iii) how to determine the threshold for a limitation to transparency based on the ground of the need to protect integrity of the arbitral process.

Manageability of the arbitral proceedings

144. At the fifty-third session of the Working Group, the general question of case management had been said to be an important one to be further considered (A/CN.9/712, para. 72). Rules on transparency should not create delays, increase costs or unduly burden the arbitral proceedings and a right balance should be found between the public interest and the manageability of the arbitral proceedings.

145. At the current session of the Working Group, it was said that the manageability of the arbitral proceedings was an important aspect to take into account when designing rules on transparency, because rules on transparency should also aim at preserving the right of effective access to court. It was further said that a too expensive procedure that might result from organizing transparent proceedings could jeopardize a party's human right to effective access to justice.

146. However, concerns were expressed that a general rule on manageability of the arbitral proceedings would contribute to a significant erosion of transparency.

147. After discussion, the Working Group considered that the right balance might well need to be found in relation to each provision in the rules on transparency, rather than as part of the limitations to transparency.

7. Repository of published information ("Registry")

148. The Working Group recalled that, at the fifty-third session of the Working Group, suggestions had been made that information could be made publicly available by the parties, either the host State or the investor, or by a neutral registry (A/CN.9/712, paras. 37, 73-75). General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague and ICSID had expressed their readiness to provide such registry services. A concern was expressed as to whether establishing a neutral registry fell within the mandate of the Working Group or of UNCITRAL itself. In response, the Working Group generally agreed that consideration of a neutral registry should be considered as an integral part of the mandate received from the Commission to prepare a workable legal standard on transparency in treaty-based investor-State arbitration.

149. The Working Group discussed the issue whether establishing a neutral registry should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration. Examples were given of regional arrangements, under which comparable information was provided directly by the various States involved. It was generally agreed that further information should be provided about such experience. It was also pointed out that in the case of arbitration cases handled by existing arbitration institutions, the institution administering the case would be best placed to publish information in compliance with a legal standard on transparency.

150. The prevailing view, however, was that the existence of a central registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. It was generally felt that it might be premature to attempt designing the detailed features of such a registry until decisions had been made by the Working Group as to the precise functions it would fulfil. For example, the amount and the cost of legal work required to summarize cases or redact documents would need to be taken into account, in addition to simple clerical work required by the publication of unedited documents. It was agreed that further investigation was required of the parameters to be taken into account in setting up such a registry. Particular points to be further discussed were administrative issues such as the funding, governance and liability of such a registry, as well as the languages in which it would function. In that context, a suggestion was made that in addition to any publication by the central registry, States could play a

complementary role, for example by making public information available in the local language.

151. After discussion, the Working Group agreed to pursue discussion of the issues raised by the establishment of a central registry at a future session. The Secretariat was requested to conduct a preliminary investigation of the above-mentioned issues and to collect information from organizations experienced with comparable functions.

V. Other business

152. In accordance with the decision of the Commission at its forty-third session (see above, para. 3), the Working Group proceeded on a discussion to identify other topics which arose more generally in treaty-based investor-State arbitration that would deserve additional work and thus might be brought to the attention of the Commission at a future session.

153. After considering whether the question of participation in the proceedings of a third party having a vested interest in the case (see above, para. 128) and the suggestion that specific rules regarding the appointment of arbitrators should be designed (see above, para. 57), the Working Group agreed that those matters should not be reported to the Commission. The Working Group reiterated its decision made at its fifty-third session (see A/CN.9/712, para. 103) to seek guidance from the Commission on whether the topic of the possible intervention of a non-disputing State party could be dealt with by the Working Group in the context of its current work.